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IN THE

Supreme Court of the United States

OCTOBER TERM 1932

No. 60

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

CHARLES E. O'ROURKE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (R. 48-53) is reported at 194 F. 2d 612. The opinion of the District Court (R. 40-44) is reported at 99 F. Supp. 506.

Jurisdiction

The judgment of the United States Court of Appeals was entered February 26, 1952 (R. 53-54). The petition for a writ of certiorari was filed on May 12, 1952, and was granted on October 13, 1952 (R. 55). Jurisdiction is conferred upon this Court to review this case by writ of certiorari under Title 28, United States Code, Section 1254.

Question Presented

The question presented is whether a freight brakeman employed by a railroad and engaged in interstate commerce may invoke the *Federal Employers' Liability Act*, 45 U. S. C. A. Sec. 51 et seq., and the *Safety Appliance Acts*, 45 U. S. C. A. Sec. 1 et seq., when he was injured in the performance of operational railroad duties upon a car float moored in navigable waters.

Statutes Involved

The statutes involved are the *Federal Employers' Liability Act*, 45 U. S. C. A. Sec. 51 et seq., *Safety Appliance Acts*, 45 U. S. C. A. Sec. 1 et seq., the pertinent provisions of both of which are set forth in the Appendix (*infra*, p. 14), and the *Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. Sec. 901 et seq., hereinafter sometimes referred to as the Compensation Act, and the pertinent provisions of which are set out as an Appendix to petitioner's brief.

Statement

Respondent filed a complaint (R. 3-5) in the United States District Court for the Eastern District of New York seeking to recover money damages on account of injuries received. The complaint was based upon the Federal Employers' Liability Act, *supra*, and alleges a violation of the Safety Appliance Acts, *supra*, in that respondent's injuries were caused by a defective and inefficient hand brake on one of petitioner's freight cars. Petitioner moved to dismiss the complaint under the Federal Rules of Civil Procedure, Rules 12b(6), 56b and 56d. This motion (R. 35) was based upon the pleadings (R. 3-7), the deposition of respondent (R. 7-34), affidavit of counsel

in support of the motion (R. 36-38) and affidavit of counse in opposition to the motion (R. 38-40). The District Cour held that the provisions of the Longshoremen's and Harbo Workers' Compensation Act, *supra*, were applicable an that respondent's remedy thereunder was exclusive (R 40-44).

The United States Court of Appeals for the Secon Circuit reversed, with the majority opinion holding tha respondent was a railroad employee injured while engage in distinctive railroad work and was not employed in mari time employment at the time of his injury within the mean ing of the Compensation Act so as to limit his rights thereb (R. 48-51).

As conceded by the petitioner, it employed respondent as a railroad freight brakeman in its yards at Jersey City New Jersey (R. 5, 36). He was a regular member of a railroad drill crew consisting of an engineer, fireman, conductor and two freight brakemen (R. 11). Their job was to make up freight cars into trains in the petitioner's yard (R. 9-10). In these operations, respondent's duties concerned themselves only with the movement of trains and cars and the routine railroad procedures in connection therewith. This was the only type of work in which he participated and for which he was trained by the petitioner (R. 9). Petitioner's characterization of respondent as a trained stevedore (Brief p. 10) is based on respondent's several months' employment as a loader by a third party prior to 1942 (R. 8). Subsequently, and prior to his accident, he had six years of training and experience with the petitioner as a railroad freight brakeman and did no stevedoring work (R. 9).

From time to time respondent's duties, as above outlined, required him to work on car floats (R. 9). At the time he was injured he and his crew were preparing to move some freight cars from a car float moored in navigable waters. They proceeded onto the car float with a pusher engine and coupled to the lead car (R. 13). Respondent,

as was his duty, then proceeded to release the hand brakes on the cars on the float. When and if his duties as a freight brakeman took him upon car floats, his only tasks were to release hand brakes or "pull the pin or couple up" (R. 10). It was while attempting to release the brake on one of these cars that he was injured (R. 19-23). As alleged in his complaint (R. 4), respondent was caused, by reason of the defective and inefficient condition of the brake, in violation of the Safety Appliance Act, *supra,* to be precipitated from the car to the platform below. He sustained severe and permanent injuries.

ARGUMENT

Respondent was a railroad employee whom the Safety Appliance Act was intended to protect, and, having suffered injury through its violation, he may bring suit against his railroad employer under the Federal Employers' Liability Act.

The undisputed facts establish that respondent was a freight brakeman employed in operational railroading at the time of his injury. He was thereby engaged, as a matter of law, in railroad employment—an employment accompanied with the particular risks pertinent to the business of railroading. Accordingly, the Compensation Act does not apply and respondent must be allowed to proceed to enforce his substantial rights under the Federal Employers' Liability Act and Safety Appliance Act, *supra.* To hold otherwise would be to disregard the constant and established course of liberal construction of these Acts followed by this Court. See *Urie* v. *Thompson,* 337 U. S. 163, 181-182, and *Lilly* v. *Grand Trunk Western R. Co.,* 317 U. S. 481, 486.

The Compensation Act (Sections 902(4) and 903(a)), by indirection at least, includes within its coverage only those employees engaged in maritime employment who are

injured upon navigable waters. These two factors—maritime employment and injury upon navigable waters—are separate and distinct provisions, each of which must be shown to exist before the Compensation Act applies. The fact that an injury occurred upon navigable waters does not in and of itself require a finding of maritime employment. On this subject the position of this Court was made clear in *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128. It being conceded therein that Nogueira was injured upon navigable waters, the only question was whether he was engaged in maritime employment. The *Nogueira* opinion relied heavily upon two cases to show that he was: *Atlantic Transport Company of West Virginia* v. *Imbrovek*, 244 U. S. 52, and *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, both of which held that the work of a stevedore in loading a ship was maritime in its nature and that he was thereby brought within admiralty jurisdiction if injured over navigable waters. On this reasoning Nogueira, who was a railroad freight handler actually doing the work of a stevedore in loading freight into railroad cars on a float, was held to be engaged in maritime employment; accordingly, his exclusive remedy was under the Compensation Act.

Concededly, the *Nogueira* decision followed the purpose of Congress in legislating the Compensation Act. As this Court stated in *Norton* v. *Warner Co.*, 321 U. S. 565, 569-570: "The Senate Report (S. Rep. No. 973, 69th Cong., 1st Sess., p. 16) makes clear that 'The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as longshoremen. These men are mainly employed in loading, unloading, refitting, and repairing ships'". Nogueira, though a railroad employee, was obviously doing the work of a longshoreman or stevedore; the respondent here, just as obviously, was not so engaged but was in every respect performing the duties of an operational railroader. His was the very occupation and employment that the Federal

Employers' Liability Act and Safety Appliance Acts were designed to protect. The purpose of the Federal Employers' Liability Act was to prescribe "a rule applicable where the parties are engaged in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto". *Southern Pacific Company* v. *Jensen, supra*, p. 213. In this case respondent was unquestionably employed in "something having direct and substantial connection with railroad operations". His work consisted literally and solely of running trains. He was not doing stevedoring nor longshoremen's work, nor engaged in maritime employment within the meaning of the Compensation Act and the decisions of this Court to which reference has been made above.

It is of interest to note that because of the Constitution, Article III, Section 2, state law could not provide compensation to longshoremen. To fill this gap the Compensation Act was passed. *Norton* v. *Warner Co., supra.* Nogueira and other railroad employees doing longshoremen's work thus could not qualify for state compensation. In addition, since this was before the 1939 amendment to the Federal Employers' Liability Act (Appendix, *infra*, p. 14), unless they were actually engaged in interstate commerce at the time of injury they had no remedy under that Act either. There were many situations where no remedy whatsoever was available to this class of railroad employee. Operational railroaders, such as the respondent, were not at the same disadvantage. Their rights, then and now, under the Federal Employers' Act and Safety Appliance Acts were, and are, clear and unequivocal. Because of this it is difficult to comprehend what reason, if any, Congress could have for intending, under any circumstances, to place them within the coverage of the Compensation Act. Congress placed no exception within the provisions of the Compensation Act for this class of employees because they already

had complete and substantial remedies provided for them by federal statutes.

The decision of the District Court in this case was based upon the thesis that since the tort committed against respondent occurred over navigable waters it was therefore maritime and subject exclusively to the Compensation Act. No regard was given to the nature of his employment. It was urged that this "locality test" was the only "true meaning" to be derived from the *Nogueira* case, and that the precise task in which a "railroader" is engaged is immaterial (R. 43-44). Even the dissenting opinion in the Circuit Court disagrees with this, for there it is stated that "it was his 'actual duties' at the time which controlled" (R. 53). It is obvious that under the Compensation Act the locus of the accident being on navigable waters is only one of two conditions that must be fulfilled before the remedy provided therein becomes exclusive. The other is the condition of maritime employment. When the *Nogueira* case was before the Circuit Court of Appeals for the Second Circuit (32 F. 2d 179), Judge Swan writing the opinion, it was stated (p. 182): "*Moreover, it does not follow that the mere locus of the accident necessarily determines the right*" (emphasis supplied). There was no language in this Court's opinion in the same case which adversely affected that statement. A fortiori, this Court has affirmatively held that the fact that an employee is over navigable waters when injured does not itself determine that he is engaged in maritime employment. See *Grant Smith-Porter Co.* v. *Rohde*, 247 U. S. 469; *Rosengrant* v. *Havard*, 273 U. S. 664. In this case it is conceded that respondent's only duties were concerned with the releasing of hand brakes on railroad freight cars, or the coupling and uncoupling of these cars. This was a distinctive operational railroad activity relating only to the business of railroading. To conclude that the instant his railroad activities required him to step from land aboard a car float his employment automatically became maritime is to ignore reality. Such a conclusion can be reached only

by making the locality of the accident the sole test of maritime employment. This reasoning finds no basis in the various statutes involved herein, in the intent of Congress nor in the decisions of this Court.

Petitioner's arguments both in the District Court and the Circuit Court relied exclusively on the theory that merely because the locus of the accident was upon navigable waters respondent's only remedy was under the Compensation Act. Petitioner, at least tacitly, concedes now that this is only one of two conditions which must be fulfilled before the Act applies and that the nature of respondent's employment must also be shown to be maritime. In this regard it is pertinent to note that the dissenting opinion in the Circuit Court apparently agrees with the majority opinion in every respect except as to the nature of this respondent's employment. As already noted, the dissent states that it was respondent's actual duties at the time which controlled. And yet in almost the same breath his employment is categorized as being maritime apparently for no other reason than the fact that at the time of his injury he was physically over navigable waters. Reliance is placed by petitioner on this Court's decision in *Parker* v. *Motor Boat Sales*, 314 U. S. 244. That case concerned a person employed as a janitor who was injured while actually operating a motor boat on navigable waters. If anything, that case sustains respondent's position here, for the injured person in the *Parker* case was without question performing a maritime service. He was actually operating a boat. This is far different from operating a railroad freight car. It is inconceivable that the latter employment could be construed as maritime.

The dissenting opinion in the Circuit Court here also relied upon this Court's decision in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251. In determining whether an injured person was an employee within the coverage of the Compensation Act it was there held that "The question concerns his actual duties". What was the

primary duty? See also *Merritt-Chapman & Scott Corp. et al.* v. *Willard et al.*; 2 Cir., 189 F. 2d 791. Whether a given employee is a member of a ship's crew or whether he is a harbor worker depends on the nature of his duties. In distinguishing, therefore, between railroad employment and maritime employment the same logic should be applied. The fact that the Compensation Act provides a specific exception as to the coverage of members of a ship's crew is of no moment inasmuch as, if only by indirection, a railroad employee not engaged in maritime employment is also excepted. Applying the reasoning of the *Bassett* case to the respondent here, the conclusion is inescapable as to the non-maritime nature of his employment.

In *Baizley Iron Works* v. *Spun*, 281 U. S. 222, 230, the question was whether an employee doing repair work was engaged in maritime service. In holding that he was this Court observed that:

> "What work has *direct* relation to navigation or commerce must, of course, be determined in view of surrounding circumstances as cases arise." (Emphasis supplied.)

In view of respondent's conceded actual and primary duties as a freight brakeman it is clear that his work had no relation whatsoever to navigation or commerce upon navigable waters. His physical presence on a moored car float does not change the character of his duties, either in whole or in part. Petitioner's contention that unloading cargo from a ship or car float is the same thing as running a railroad car off a car float is merely a play on words. Respondent's employment as a member of a drill crew was to make up freight cars into trains in the petitioner's freight yard (R. 9-10). Whether these cars were in a roundhouse, on a spur track, in a repair shop, on a side track, or on a moored car float, their assembly and formation in a train was a distinctive railroad procedure completely foreign in its nature to maritime service. Two entirely different modes of transportation are involved.

In the recent case of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 96, this Court stresses the fact that historically the work of a stevedore was a maritime service performed until recent times by members of the ship's crew. The work "has become a specialized service devolving upon a class as clearly identified with maritime affairs as are the mariners". *Atlantic Transport Co.* v. *Imbrovek, supra.* This same thesis was actually the basis of the decision in the *Nogueira* case. Petitioner now abandons the "locality test" theory it relied on in the lower courts and urges here that respondent's duties were essentially the same as those of the stevedore in the *Nogueira* case. Yet it is conceded that respondent was a freight brakeman whose only duties were in connection with the operation of railroad freight cars. The work of a brakeman engaged in operational railroading cannot properly be held to be a service formerly rendered by a ship's crew. It is completely disassociated from maritime service.

The Safety Appliance Act, *supra*, makes it unlawful for a railroad to provide its cars with other than efficient hand brakes. Respondent alleges in his complaint (R. 4) that he suffered his injury because of a violation of this Act. The recent case of *Coray* v. *Southern Pac. Co.*, 335 U. S. 520, was concerned with a violation of the Act because of a defective brake. The decision is highly pertinent here in that it clearly indicates those railroad employees whom the Act is intended to protect. This Court had this to say at pages 522-524:

> "And this Act (Safety Appliance), fairly interpreted, *must be held to protect all who need protection* from dangerous results due to maintenance or operation of congressionally prohibited defective appliances. Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibitive defective equipment *not from the position the employee may be in or the work which he may be doing at the moment when he is injured*'." (Emphasis supplied.)
>
> * * * * * *

"The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful purpose."

In simple and unambiguous language this Court has said that no matter where an employee is working, no matter what type of work he may be doing at the moment he is injured, his employer railroad company is liable for injuries suffered as a result of the Act's violation. This language permits no exceptions. Petitioner has persistently ignored this concise statement of law in the District Court, the Circuit Court and here. Nor may it escape liability thereunder "by the introduction of dialectical subtleties" whereby it has attempted to disguise the nature of respondent's employment.

The effect of the Circuit Court's decision here is not to substitute uncertainty for certainty, as petitioner contends, nor to lead us into a "chartless morass" as the dissenting opinion below suggests. Exactly the opposite is true. If these railroad trainmen are relegated to coverage under the Compensation Act, in fact situations such as we have here, the result would be that their available remedies might vary from minute to minute, or even from second to second. This is so because they will gain or lose a remedy according to the particular service they are rendering at the very moment of their injury. If petitioner's contention is correct a result such as that in the following hypothetical case would occur: Two brakemen, members of a drill crew, are injured at the same time when the boiler of their locomotive explodes. The locomotive is on land at dockside removing freight cars from a car float. One brakeman is on land; the other is a stride away on the car float. The brakeman on land would have recourse to the substantial benefits of the Federal Employers' Liability Act and the Safety Appliance Acts. The brakeman on the car float, so petitioner contends, would be covered

by the Compensation Act. Such a result would be unjust and illogical. Congress never intended, in passing the legislation involved here, that such a result should follow.

CONCLUSION

The principle that torts occurring upon navigable waters determine admiralty jurisdiction is not in question here. The problem is as to which one of several Federal statutes is to be held applicable to the respondent. The Compensation Act was designed to protect those engaged in maritime employment whereas the Federal Employers' Liability Act and Safety Appliance Acts were designed to protect those engaged in railroad employment. It is respondent's contention that the *Nogueira* case was decided upon the principle that to qualify under the Compensation Act a railroad employee must necessarily be engaged in maritime employment. Whether or not an employee is so engaged depends upon the facts in each case and is to be determined by an inquiry as to what his actual duties were. Of assistance in making this determination is the dicta in *Southern Pacific Company* v. *Jensen, supra,* to the effect that railroad employment is "something having direct and substantial connection with railroad operations". As compared to this there is the inference logically to be deduced from *Seas Shipping Co.* v. *Sieracki, supra,* and *Atlantic Transport Company* v. *Imbrovek, supra,* that maritime service is that service traditionally rendered by a ship's crew. The undisputed facts and the inferences fairly to be drawn therefrom establish as a matter of law that the respondent here was engaged in railroad employment as distinguished from maritime employment. Accordingly, the Compensation Act does not apply and the respondent should be allowed to proceed to enforce his substantial rights under the Federal Employers' Liability Act and Safety Appliance Act.

It is respectfully urged that the judgment of the United States Court of Appeals should be affirmed.

Respectfully submitted,

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New York, N. Y., November 28, 1952.

APPENDIX

The relevant provisions of the Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51 et seq., and the Safety Appliance Act, 45 U. S. C. A. Sec. 1 et seq., are as follows:

"Section 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." (Note 1.)

"Section 11. Safety appliances required for each car; when handbrakes may be omitted."

"* * * All cars must be equipped with secure sill steps and efficient handbrakes * * *."

(Note 1.) 1939 Amendment; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404, added last paragraph, defining employee.